

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Empower families -- This bill may provide stability for foster children but may limit a reunification with natural parents.

B. EFFECT OF PROPOSED CHANGES:

Background - Moving Foster Children

Chapter 39, F.S., provides for proceedings regarding dependency of minor children. A dependent child is one that is dependent upon the state for services due to abuse, neglect, abandonment, or death of the parents or guardian. Once a child is adjudicated dependent, the court has the power by order to:

- Require the parent or the legal custodian and the child, to participate in necessary treatment and services;
- Require the parties to participate in dependency mediation; and
- Require placement of the child either under the protective supervision of an authorized agent of the Department of Children and Family Services ("DCF"), in the home of one or both of the child's parents, in the home of a relative of the child, with another adult approved by the court, or in the custody of the DCF.¹

A disposition hearing is when a court determines the appropriate placement for a child in dependency cases.² All relevant and material evidence may be received by the court, but the court must receive and consider the predisposition study, and approve the case plan at the hearing.³

In 2000, the legislature enacted s. 39.522, F.S., regarding change of custody after the disposition hearing. The statute provides:

- A child who has been placed in the child's own home under the protective supervision of an authorized agent of the department, in the home of a relative, in the home of a legal custodian, or in some other place may be brought before the court by the department or by any other interested person, upon the filing of a petition alleging a need for a change in the conditions of protective supervision or the placement.
- If the parents or other legal custodians deny the need for a change, the court must hear all parties in person or by counsel, or both. Upon the admission of a need for a change or after such hearing, the court must enter an order changing the placement, modifying the conditions of protective supervision, or continuing the conditions of protective supervision as ordered.
- The standard for changing custody of the child is the best interest of the child.
- If the child is not placed in foster care, then the new placement for the child must meet the home study criteria and court approval pursuant to this chapter.

¹ 25 Fla. Jur. 2d, Family Law s. 273.

² 25 Fla. Jur. 2d, Family Law s. 272.

³ *Id.*

- In cases where the issue before the court is whether a child should be reunited with a parent, the court must determine whether the parent has substantially complied with the terms of the case plan to the extent that the safety, well-being, and physical, mental, and emotional health of the child is not endangered by the return of the child to the home.

Section 39.701(9)(f), F.S., requires the dependency court to review a child's permanency no later than 12 months after a child was sheltered.⁴ Section 39.621, F.S., identifies adoption as the primary permanency option when reunification with a parent is not appropriate.

Section 39.812(4), F.S., provides that, when the department denies foster parents' applications to adopt a child, the Department of Children and Families ("department") must obtain court approval in order to remove the child from the foster home if the child has resided there for at least 6 months.

Effect of Bill - Moving Foster Children

The bill makes finding placement for a child with a relative a priority. The bill establishes a continuing duty on behalf of parents to assist in locating relatives with whom the child could be placed.

This bill adds foster homes to the list of placements from which a child can be moved pursuant to a postdisposition change of custody. Further, the bill expands who a court must hear in determining the need for a change in custody. The actual custodian of the child is permitted to notify the court of objections with the placement. If there are objections to a change in placement, the court must hear all parties in including the actual custodian at an evidentiary hearing on the issue. Nevertheless, the bill is clear that the standard for changing the custody remains the best interest of the child standard.

When the proposed change of placement is to any person other than a parent, the court's decision may not be based solely on the existence of a biological or prospective adoptive relationship with a placement or on the expressed wishes of a parent, caregiver, or relative. The court's best interest determination must be based on evidence admitted at the hearing and must include an evaluation of, and entry of findings as to, all factors affecting the welfare of the child. The bill includes the following non-exhaustive factors the court must consider in ruling on the proposed change of placement:

- The ability of the current and proposed custodians to provide for the safety, well-being, and physical, mental, and emotional health of the child.
- The love, affection, and other emotional ties existing between the child and the current and proposed custodians.
- The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
- The preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.

The court must also utilize these factors when determining whether the best interest of the child will be served by transferring custody of the child to a prospective adoptive parent when the child has resided in the same out-of-home placement for more than 1 year.

⁴ Sheltered is defined in s. 39.01(64), F.S. as "a placement with a relative or a nonrelative, or in a licensed home or facility, for the temporary care of a child who is alleged to be or who has been found to be dependent, pending court disposition before or after adjudication."

Background - Certain Disability Hearings

All persons who have been denied federally-funded developmental disability services or other public benefits, including foster children, are entitled to a fair hearing conducted by DCF's Office of Appeal Hearings. The fair hearing process is designed to provide relatively rapid and easily accessible due process proceedings to contest the denial, reduction or termination of benefits or services. The fair hearings process is conducted according to federal and state law and rules that ensure the individual's right to due process is protected.⁵ Applicants for or recipients of public benefits have the right to appeal an adverse decision in a fair hearing to the District Court of Appeal, but the agency may not seek an appeal.⁶

Effect of Bill - Certain Disability Hearings

This bill directs that all decision affecting developmental disability benefits of dependent children, who are in the custody of the department, must be heard by an administrative law judge at the Division of Administrative Hearings.

C. SECTION DIRECTORY:

Section 1 amends s. 39.402, F.S. requiring a court to inquire as to any relative that might be considered as a placement option for a child.

Section 2 amends s. 39.521, F.S. deleting a requirement to use diligent efforts to locate an adult relative to care for a child.

Section 3 amends s. 39.522, F.S. providing a standard for changing the custody of a child and providing factors a court must consider in determining a change of placement to any person other than a parent.

Section 4 amends s. 63.082, F.S. providing for consideration of certain factors in determining whether the best interest of the child will be served by transferring custody of the child when the child has resided in the same out-of-home placement for more than 1 year.

Section 5 amends s. 120.80, F.S. requiring that an administrative hearing be conducted by an administrative law judge assigned by the Division of Administrative Hearings in cases involving children with developmental disabilities under certain circumstances

Section 6 providing an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The Agency for Persons with Disabilities is unable to provide a fiscal impact on state government. See Fiscal Comments.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

⁵ See, e.g., 42 U.S.C. 1396a(3); 42 CFR 431.200, et seq; s. 409.285, F.S.

⁶ Sections 120.68, 409.285, F.S.

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Agency for Persons with Disabilities

Hearings before the State of Florida Division of Administrative Hearings ("DOAH") would most likely create substantially higher litigation costs, depending on the number of hearings and hearing hours held there and around the state. For the 06-07 fiscal year, DOAH is requesting \$11,378 from APD, based upon a projected six hours of hearings, for a generalized cost of \$1,896.33 per hearing hour. (The projection is calculated from the number of hearing hours an agency requested in the prior year.) DOAH's DCF apportionment is \$536,171 based on a projected total of 282.75 hearing hours, also costing \$1,896.33 per hearing hour. DCF hearing officer hours, on the other hand, are estimated generally by the DCF Office of Appeals to cost DCF \$175.00 per hearing hour.

APD does not classify its clients in such a way that it can provide an estimate of the number of hearings that might be requested on behalf of children in the custody of the department and in out-of-home care. However, based on hearing experiences, the Office of Appeals estimates approximately four to six hearings per year for this class of APD clients.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Department of Children and Families Comments

This bill first adds foster homes to the list of placements from which a child can be moved pursuant to a postdisposition change of custody. This change creates an anomaly, since s. 39.522, F.S., actually provides for modification of legal custody, not modification of physical placements. A foster home is only a

physical placement. The actual temporary legal custodian, when a child is in a foster home, is the department. As the legal custodian, the department determines the particular licensed foster care placement for a foster child. Court interference with this determination would violate the separation of power between the judicial and executive branch.

The changes of the bill will give foster parents the standing to object to a modification of placement, even if that modification were actually reunification with a parent. In other words, foster parents may become parties to the proceedings.

The language in the bill conflicts with ss 120.569 and 120.57, F.S., because it would direct that all decisions affecting developmental disability benefits of dependent children be heard by an administrative law judge (ALJ), regardless of whether there were disputed issues of material fact. The bill would also place Florida in potential violation of federal law. Subsection 120.80(7), F.S., currently exempts *all* federally funded public benefits decisions from being heard by an administrative law judge, because the federal hearing procedures and requirements (see 42 CFR s. 431.200, et seq.) are different from those in ss. 120.569 and 120.57, F.S., and from the Uniform Rules of Procedure that apply to administrative proceedings in Florida. See ch. 28-106, F.A.C. To the extent that the federal procedures are different, adherence to the State of Florida Division of Administrative Hearings ("DOAH") requirements would be unlawful.

Additionally, providing that such cases be heard in DOAH would greatly delay their resolution. The Office of Appeal Hearings generally schedules and hears these cases more quickly than DOAH could. Furthermore, the Office of Appeal Hearings has final order authority in these cases, whereas DOAH would not. The client would be required to wait for DOAH to render a Recommended Order, and then for the agency to prepare and issue a Final Order, before the issue were resolved or even ripe for appeal to the District Court of Appeal.

Agency for Persons with Disabilities

As to section 3 [now section 5 of the bill], "fair hearings" presently administered by a DCF hearing officer would be held by the DOAH administrative law judges for this particular class of clients. This "exception to the exception" creates a forum disparity, in which fair hearings for some clients are held before DOAH administrative law judges, and fair hearings for the rest of them would be before DCF hearing officers.

Furthermore, the amendment to require hearings before a different agency appears to conflict with federal provisions at 42 U.S.C. 1396a (a)(3), which provides for a fair hearing, and CFR 431.205, which provides that the approved Medicaid agency must maintain a hearing system that provides for a hearing before that agency. Hearings before DOAH would not comply with Federal law, because they would not be held before the Medicaid state agency.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On April 4, 2006, the Civil Justice Committee adopted one amendment that removed everything after the enacting clause. The amendment:

- Removed the rebuttable presumption that it is in the best interest of a dependent child who has resided in a particular out-of-home placement for more than 1 year to remain in that placement with the foster parent as the permanent custodian.

- Established factors a court is to consider when ruling on a proposed change of placement for a child.
- Required courts make decisions on placements using the best interest of the child standard.

The bill was then reported favorably with a committee substitute.